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No. 85-1905

In the Supreme Court of the United States

OCTOBER TERM, 1986

YONG BING-NAM, AKA YONG PIAN-NAM, AKA BING,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly refused to enforce a cooperation agreement between petitioner and the government on the ground that petitioner did not comply with the terms of that agreement.

2. Whether the government's rebuttal summation was proper, where petitioner had argued in summation that only two pieces of evidence linked him to the crime and the prosecutor, in rebuttal, responded by pointing to other incriminating evidence against petitioner.

3. Whether the district court properly refused to allow petitioner to introduce extrinsic evidence of a prior inconsistent statement made by a government witness, where petitioner had not confronted the witness with the statement during that witness's testimony.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7-10) is reported at 788 F.2d 4 (Table). The opinion of the district court on various pretrial motions is reported at 594 F. Supp. 248.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1986. The petition for a writ of certiorari was filed on March 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted of kidnapping, in violation of 18 U.S.C. 1201(a)(1) (Count 1), conspiracy to kidnap, in violation of 18 U.S.C.

1201(c) (Count 2), conspiracy to transmit ransom demands in interstate commerce, in violation of 18 U.S.C. 371 and 875(a) (Count 3), receipt of ransom money, in violation of 18 U.S.C. 1202 (Count 11), and conspiracy to receive ransom money, in violation of 18 U.S.C. 371 and 1202 (Count 10). Petitioner was sentenced to life imprisonment on Counts 1 and 2, to five years' imprisonment on Counts 3 and 10, and to ten years' imprisonment on Count 11, with all sentences to run concurrently. In addition, petitioner was ordered to pay restitution in the amount of $150,000. C.A. App. 21a, 23a, 27a-35a; Pet. App. 8.[1]

1. The evidence at trial established that in the fall of 1983, petitioner and his co-defendants planned and ultimately carried out the kidnapping of Yim Ling Eng from her residence in Hurley, New York, and transported her to New Jersey. The kidnappers demanded a ransom from Eng's husband, William Eng. William Eng complied with the request, and the ransom money was delivered to co-defendant Gong, who held himself out as an intermediary between William Eng and the abductors, but who in fact was one of the kidnappers. Yim Ling Eng was not released, and her whereabouts remain unknown. Pet. App. 8-9; 594 F. Supp. 248, 250 (1984).

On October 6, 1983, four days after the kidnapping, petitioner was arrested. Early the next morning, after being advised of his *Miranda* rights and executing a written

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[1]Petitioner was acquitted on three counts of transmission of ransom demands in interstate commerce. Co-defendants Yong Bing Gong, Quah Choon-Pheng and Yong Bing-Keong were convicted of various conspiracy, kidnapping, and ransom-related charges. Co-defendants Leong Hoong-Sien and Shirley Wong were acquitted on all counts. Co-defendant Chai Chee Keong pleaded guilty to receipt of ransom money, and the remaining charges against him were dismissed. C.A. App. 14a, 21a, 23a-24a; Pet. App. 9. Co-defendant Mak Gin was (and still remains) a fugitive (Pet. App. 9).

waiver of those rights, petitioner was questioned by state police officers and Federal Bureau of Investigation agents. Petitioner initially denied participating in or knowing anything about the kidnapping. When FBI Agent Wesley Wong advised petitioner of the charges against him, petitioner asked how long a sentence he could receive. Wong replied that the maximum sentence could be life imprisonment, but that the actual sentence would be determined by the court. Shortly thereafter, petitioner proposed a deal to the FBI agents whereby in exchange for immunity from prosecution, he would furnish information about the kidnapping. The agents then communicated petitioner's offer to their superiors and to representatives of the United States Attorney's Office. While waiting for a response from the United States Attorney's Office, FBI Agent Joseph Flynn discussed with petitioner a list of seven questions about the kidnapping that Flynn considered significant to the investigation. Petitioner stated that could answer five of the questions, but could not answer the two questions concerning the whereabouts of Eng or of those involved in the abduction. 594 F. Supp. at 250-251.

Subsequently, the United States Attorney's Office authorized an agreement with petitioner containing the following conditions: (1) petitioner would give truthful and complete answers to the seven questions identified by Flynn; (2) the government would limit the maximum sentence facing petitioner to ten years; (3) the agreement would be nullified if the government later determined that petitioner had given false or incomplete information; and (4) petitioner's duty to cooperate would be a continuing one. Petitioner accepted the agreement and proceeded to respond to the five questions that he had previously said he could answer. 594 F. Supp. at 252.

The following day, Flynn advised petitioner that he and other agents wanted to continue questioning petitioner about the kidnapping. Flynn reminded petitioner of his cooperation agreement and stated that there were inconsistencies and omissions in his previous answers. Flynn, Wong, and a local police investigator then questioned petitioner further. Petitioner, however, essentially reiterated what he had previously told the agents. 4/5/84 Tr. 825-832, 864-872. After that interview, petitioner gave no further information to the police (594 F. Supp. at 255-256). Accordingly, having determined that petitioner had breached the agreement by failing to cooperate fully with the investigation, the government refused to carry out its part of the bargain.

2. Petitioner subsequently moved to compel enforcement of the cooperation agreement. The district court, after conducting an evidentiary hearing on the motion, ruled that petitioner had breached the agreement and therefore could not enforce it against the government. Specifically, the court found (594 F. Supp. at 255):

> [T]he Court is persuaded that defendant's response to questioning breached fundamental terms of the agreement, viz., that his answers be truthful and complete, and that his obligation to cooperate be a continuing one. Contrary to defendant's suggestion, the Government did not seek to impose additional conditions upon defendant but rather sought only to obtain the full cooperation for which it had bargained. That cooperation was not forthcoming and its absence has been identified by the Government in exhaustive detail.

The court then specified numerous examples of errors and omissions in what petitioner had told the agents (*ibid.*), and concluded that "[petitioner's] misstatements, omissions,

and continued failure to cooperate have deprived the Government of its bargained-for benefit" (*id.* at 256).[2]

After being tried and convicted, petitioner appealed his conviction to the court of appeals. He claimed—as he does in this Court—that (1) the government should be compelled to perform under the cooperation agreement; (2) the prosecutor's rebuttal summation was improper; and (3) the district court erred in refusing to admit extrinsic evidence of a prior inconsistent statement made by a government witness (Pet. 5-6). The court of appeals rejected all three contentions.[3] As to the cooperation agreement, the court ruled that the agreement was unenforceable because no guilty plea had been entered. With respect to the prior inconsistent statement, the court ruled that extrinsic evidence of that statement was properly excluded, because petitioner had failed to lay a proper foundation for offering the statement, as required by Fed. R. Evid. 613(b). The court also found that even if there was error with respect to the statement, the error was harmless. The court rejected without comment petitioner's challenge to the prosecutor's rebuttal argument. Pet. 9.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other

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[2]As it turned out, the government was prohibited from using at trial even the incomplete and misleading statements given by petitioner. The district court suppressed those statements on the ground that the delay between petitioner's arrest and arraignment (during which time the statements were made) was impermissibly long (594 F. Supp. at 253-254). Petitioner does not allege that any evidence at trial was derived from, or tainted by, the statements he made to the police.

[3]The court also rejected petitioner's claim, which is not raised in this Court, that the evidence was insufficient to support the jury's verdict (Pet. App. 9).

court of appeals. Review by this Court is therefore not warranted.

1. Petitioner's principal contention (Pet. 4-5) is that the district court erred by refusing to enforce the cooperation agreement between petitioner and the government. Petitioner claims that he honored his part of the agreement because he "cooperated to the best of his ability" by answering the "limited set of questions" posed by the FBI (Pet. 5). That assertion, however, is contrary to the findings of both courts below. As the district court found (594 F. Supp. at 255-256),[4] petitioner gave false and incomplete answers to the FBI agents' questions. Furthermore, after the initial interviews, he failed to provide any further information whatsoever. Since petitioner failed to perform his part of the agreement, he cannot compel performance by the government. See, *e.g., United States* v. *Leach*, 749 F.2d 592, 598 (10th Cir. 1984) (defendant could not enforce cooperation agreement where he had failed to comply with terms of that agreement); *United States* v. *Brooks*, 670 F.2d 625, 627 (5th Cir. 1982) (government not bound by cooperation agreement where defendant did not fulfill promise to assist in arrest of another drug dealer); *United States* v. *Calabrese*, 645 F.2d 1379, 1390 (10th Cir.) ("It is clear that a defendant's failure to fulfill the terms of a pretrial agreement relieves the government of its reciprocal obligations under the agreement."), cert. denied, 451 U.S. 1018 (1981); *United States* v. *Donahey*, 529 F.2d 831, 832 (5th Cir.) (government not bound by plea agreement where

[4]Petitioner does not address the district court's findings that he breached the terms of the agreement. We submit that the district court's findings are correct and certainly are not clearly erroneous.

defendant, having agreed to give testimony and cooperate in prosecution of another person, gave "evasive and misleading answers"), cert. denied, 429 U.S. 828 (1976).[5]

2. Relying on *Moore* v. *United States*, 344 F.2d 558 (D.C. Cir. 1965), petitioner claims (Pet. 5-6) that the prosecutor, during his rebuttal summation, made improper arguments by raising points that were not discussed during petitioner's summation. In particular, petitioner points to the prosecutor's reference in rebuttal to $1200 of the ransom money that was found on petitioner at the time of his arrest (Pet. 5). Petitioner's contention is without merit.

In *Moore*, the court of appeals set forth the unexceptionable propositon that "[a]s a general rule, Government counsel should not be allowed to develop new arguments on rebuttal, but should be restricted to answering the arguments put forth by defense counsel." 344 F.2d at 560.[6] Contrary to petitioner's contention (Pet. 5-6), the prosecutor in this case complied fully with the teachings of *Moore*.

The testimony at trial showed that on October 5, 1983, William Eng gave petitioner $150,000 in $100 bills for delivery to co-defendant Gong, and that the money was delivered the following morning. When petitioner was arrested that evening, he had 12 of the bills from the ransom money

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[5]Furthermore, under the facts of this case, the court of appeals correctly ruled that the agreement was unenforceable because petitioner had not entered a plea of guilty prior to the government's withdrawal of the offer (Pet. App. 9, citing *Mabry* v. *Johnson*, 467 U.S. 504 (1984)). Moreover, petitioner suffered no conceivable harm from the alleged breach of the agreement by the government, since the statements given by him were not introduced against him at trial.

[6]The court in *Moore* held that despite the prosecutor's improper argument in rebuttal that defendant had failed to call a certain witness, there was no prejudice to the defendant and therefore no basis for reversal. 344 F.2d at 560.

that the victim's husband had paid the previous day. 7 Tr. 105-108; 9 Tr. 81-82; 14 Tr. 130-133.[7] In its closing argument the government argued that the money and other evidence demonstrated petitioner's guilt (29 Tr. 91-93).

In his closing argument, petitioner's counsel contended that only two pieces of evidence linked him to the kidnapping of Yim Ling Eng: the rental of the vehicle used in the kidnapping and his suggestion to Eng's husband that he enlist co-defendant Gong's assistance (30 Tr. 6-7, 32, 36, 43). Petitioner also argued that he had been charged in the case only because he was Gong's brother (30 Tr. 16). Petitioner did not mention the $1200 that had been found on him at the time of his arrest.

In rebuttal, the government specifically referred to petitioner's assertion in closing argument that only two pieces of evidence linked him to the crime (31 Tr. 25). He noted that petitioner was wrong, and that significant additional evidence linked him to the offenses, including the seizure of $1200 from petitioner at the time of his arrest (31 Tr. 25-28).[8]

The prosecutor's rebuttal was clearly a direct response to the arguments made by petitioner and was, therefore, entirely proper. Having asserted that only two pieces of evidence linked him to the crime, petitioner invited the prosecutor to discuss the other evidence against him. Far

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[7]The serial numbers of the 12 bills found on petitioner (GX 51) matched the serial numbers of the ransom bills delivered by William Eng to petitioner (GX 49).

[8]The district court overruled petitioner's objection to the prosecutor's argument (31 Tr. 27). Petitioner concedes that the trial judge "has broad discretion as to the application of the rule governing the scope of rebuttal" (Pet. 5). See, *e.g.*, *United States* v. *Lawson*, 483 F.2d 535, 539 (8th Cir. 1973), cert. denied, 414 U.S. 1133 (1974).

from having made an improper argument, therefore, the prosecutor would have been derelict in his duty had he failed to refute petitioner's erroneous closing argument.[9]

3. Finally, petitioner contends (Pet. 6) that the district court improperly refused to permit him to introduce testimony from Agent Flynn concerning certain statements allegedly made by government witness William Eng to Flynn on October 5, 1983.[10] According to petitioner, the statements were admissible because they were inconsistent with Eng's in-court testimony. This claim is without merit; as the court of appeals correctly found (Pet. App. 9), petitioner failed to comply with the foundational requirements of Fed. R. Evid. 613(b), and he was therefore not allowed to introduce extrinsic evidence of prior inconsistent statements.

The witness in question, William Eng, testified on direct examination that, after discovering that his wife had been kidnapped, he contacted petitioner. According to Eng, petitioner suggested that they contact co-defendant Gong in New York City for assistance. Eng testified that he was surprised at that remark, because he had thought Gong was in California. Eng was certain that petitioner was the first to

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[9]Even if the challenged portion of the rebuttal argument had been somehow improper, the error would not have resulted in any prejudice to petitioner, and reversal is therefore unwarranted. See *Moore*, 344 F.2d at 560; see generally *Darden* v. *Wainwright*, No. 85-5319 (June 23, 1986); *United States* v. *Young*, No. 83-469 (Feb. 20, 1985). The prosecutor's argument in question was a brief—and accurate—discussion of the evidence; it was neither unfair nor inflammatory.

[10]Petitioner does not identify these statements in his petition, except to indicate (Pet. 6) that they were made to Agent Flynn. In his brief to the court of appeals (Appellant's Br. 17), petitioner indicated that he was referring to statements made by Eng to Flynn on October 5, 1983; again, however, he never specified the precise statements to which he was referring.

suggest enlisting the aid of Gong. 7 Tr. 79-89. On cross-examination, petitioner sought to demonstrate that it was Eng, not petitioner, who had first mentioned Gong's name. That would have supported petitioner's claim that he was an innocent intermediary rather than a co-conspirator. Petitioner questioned Eng at length about his testimony on direct examination and about his purportedly inconsistent grand jury testimony. 8 Tr. 8-78.[11] With the exception of one brief reference that is not relevant here (8 Tr. 65), the only reference to Eng's October 5, 1983, interview with Agent Flynn occurred on recross examination, when petitioner merely asked Eng if he had told the truth to Flynn on October 5, 1983 (8 Tr. 112).

During the defense case, both petitioner and Gong offered into evidence portions of Eng's grand jury testimony that they claimed were inconsistent with his trial testimony (C.A. App. 536a, 544a). Petitioner also sought to elicit testimony from Flynn concerning his interview with Eng on October 5, 1983 (19 Tr. 33-36). After repeated objections were sustained to Flynn's testimony about that interview, petitioner, at the invitation of the court, made a proffer as to the evidence he sought to elicit from Flynn concerning the October 5 interview. Petitioner indicated that Eng's prior statements contradicted his in-court testimony that petitioner had first suggested contacting Gong and that Eng did not know that Gong was in New York. Petitioner did not, however, point to the specific portions of Eng's prior statements that allegedly supported his claim. 19 Tr. 31-39. After listening to the proffer, the district court sustained the government's objections to petitioner's questions about that interview (19 Tr. 39-40).

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[11]In particular, Eng had testified in the grand jury that he had mentioned Gong to petitioner because he knew that Gong worked at a gambling house in New York and knew many people (C.A. App. 536a).

Rule 613(b) of the Federal Rules of Evidence provides that extrinsic evidence of a prior inconsistent statement by a witness is not admissible "unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon." The courts of appeals have repeatedly upheld the exclusion of alleged prior inconsistent statements because of a defendant's failure to meet the foundational requirements of Rule 613(b). See, *e.g.*, *United States* v. *Elliott*, 771 F.2d 1046, 1051 (7th Cir. 1985); *United States* v. *Cutler*, 676 F.2d 1245, 1249 (9th Cir. 1982).[12]

The court of appeals correctly held (Pet. App. 9) that petitioner was not entitled to introduce extrinsic evidence of a prior inconsistent statement because he failed to comply with the requirements of Rule 613(b). Specifically, petitioner did not confront William Eng with the purported inconsistent statement so that Eng could explain or deny it. Instead, he simply asked Eng if he had told the truth to Flynn on October 5, 1983 (8 Tr. 112). Petitioner was therefore not entitled to elicit from Flynn the prior inconsistent statement that was allegedly made by Eng on October 5, 1983.[13]

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[12]The rationale of the rule is one of fairness to the witness and to the party calling him. As one leading treatise has explained (3 D. Louisell & C. Mueller, *Federal Evidence* § 358, at 561 (1979)):

> If the credibility of the witness is to be called into question, he should have some chance to defend himself; and if the direct testimony of a witness is to be undermined, the calling party should have an opportunity to show that any vacillation by the witness has an innocent explanation or does not truly raise doubts as to the evidence which the witness has given.

[13]Fed. R. Evid. 613(b) is subject to a narrow exception in cases where exclusion would be contrary to the "interests of justice." The court of appeals' ruling (Pet. App. 9) that petitioner had failed to comply with Rule 613(b) is an implicit determination that the "interests of justice" did not require admission of the extrinsic evidence in this case. Petitioner gives no reason why that exception should apply in this case.

In any event, as the court of appeals correctly noted (Pet. App. 9), even if the district court's evidentiary ruling was incorrect, the error was harmless. Petitioner cross-examined William Eng at great length (7 Tr. 163-175; 8 Tr. 5-78, 111-112), and probed various inconsistent statements that he made, including statements he made during his grand jury testimony. The evidence at issue therefore would not have added significantly to the force of the impeachment of Eng. In light of the strong evidence against petitioner in the several-week trial, the alleged error therefore could not possibly have affected the verdict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1986